Supreme Court, U.S.
FILED
99 16 99 APR 19 2000
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

H. MICHAEL VONDERHEIDE
Petitioner
Appearing Pro-Se

v.

INTERNAL REVENUE SERVICE
Respondent

On Petition For Writ Of Certiorari
To The Sixth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

H. Michael Vonderheide
Appellant, Pro-Se
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24pp

QUESTION PRESENTED FOR REVIEW

When original action includes 5 USC §706 in the jurisdictional clause, does district court and circuit court have the discretion to forego judicial review and inquiry and rule solely on litigation affidavits.

OPINIONS BELOW

There was no OPINION issued in this case.

The ORDER of the United States Court of Appeals for the Sixth Circuit from which certiorari is sought is hereby attached as Appendix A. ORDER was issued on October 29, 1999 and was not recommended for full-text publication.

A petition for rehearing was timely filed and subsequently was denied on January 21, 2000. See Appendix B.

The District Court's ORDER - dated August 25, 1998 - is included as Appendix C. And the Magistrate's REPORT & RECOMMENDATION filed June 29, 1998, follows as Appendix D.

The jurisdiction of this Court in invoked pursuant to 28 USC §1254.

Petitioner filed a civil action against the Internal Revenue Service citing original jurisdiction under 5 USC §552a(d)(1) the FREEDOM OF INFORMATION ACT. 5 USC §706 was cited to ensure judicial review of the agency records particular to Petitioner's action.

The specific portion of the statute enacted by Congress which is relevant to this petition is:

5 USC §706(2)(F) "...the court shall review the whole record..."

Appendix E §706 scope of preview.

STATEMENT OF THE CASE

The present case originated as a civil action filed in United States District Court, Southern Ohio Western Division. Docket #1-96-686 filed July 15, 1996.

The basis of the case is Petitioner filed a correct FREEDOM OF INFORMATION ACT request with the Cincinnati Internal Revenue Service Disclosure Office on April 27, 1996.

Internal Revenue Service did not respond within the time limits per the statute under 5 USC §552a and 26 CFR601.702, hence the filing of the action.

District Court dismissed the case alleging no jurisdiction based on litigation affidavits presented by Respondent in it's Motion to Dismiss.

Petitioner filed a timely appeal under 28 USC §1291 in the Sixth Circuit which upheld District Court's Dismissal.

Petitioner then filed a timely petition for rehearing.

REASONS FOR GRANTING THE WRIT

This honorable Court, in Citizens To Preserve Overton Park v. Volpe (1971) 401 US 402, clearly indicated that - while petitioners in that case were advised by the Court that the basis of their requested review, i.e. 1) formal findings by the Secretary and, 2) Secretary relied on judgement of local officials, the Secretary was not required to make formal findings and the district court nor the Sixth Circuit were required to conduct a de-novo review - the reviewing court should engage in a substantial inquiry as to the Secretary's findings.

In particular, this Court stated in Overton Park "the lower court's review was based on litigation affidavits, which are not the whole record and are an inadequate basis for review." at 419. "...litigation affidavits do not constitute the whole record compiled by the agency, the basis for review required by 706 of the Administrative Procedure Act..." at 420. The REPORT & RECOMMENDATION (Appendix D) relied solely on the Respondent's litigation affidavits.

Sixth Circuit actually stated in it's ORDER (Appendix A) "The IRS provided evidence in the form of affidavits..."

Overton Park reversed the Sixth Circuit and remanded to District Court in Memphis to conduct a review of the record.

Additionally, this Court through Pension Benefit Guaranty Corp. v. The LTV Group (1990) 496 US 633 states "Moreover, since there was no suggestion that the administrative record was inadequate to enable the court to fulfill it's 706 duties, it's holding finds no support in Citizens To Preserve Overton Park v. Volpe." Pp. 653-656

Also, in Chevron USA v. Natural Resources Defense Council, Inc. (1984) 467 US 837, this Court was clear. i.e. "If the intent of Congress is clear, that is the end of the matter; for the court...must give effect to the unambiguously expressed intent of Congress." at 843.

Nothing in the District Court ORDER (Appendix C) or the circuit Panel's ORDER (Appendix A) indicates either had sufficient information before them to determine whether the claimed documents exist or not. Both courts accepted "litigation affidavits" which

Overton Park rejected.

As recent as Bennett v. Spear (1997) 520 US 154, and Dickinson v. Zurko (1999) 000 US 98-377, this Court upheld §706 as requiring the reviewing courts to conduct a substantial review.

CONCLUSION

For the reasons stated, it is respectfully requested that the Petitioner's Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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April 19, 2000

Appendix A

United States Court of Appeals
For the Sixth Circuit
No. 98-4277

FILED

OCT 29 1999
LEONARD GREEN, Clerk

H. Michael Vonderheide,

Plaintiff-Appellant,

v.

Internal Revenue Service,

Defendant-Appellee.

ORDER

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 28(g) limits citation to specific situations please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.

Before: RYAN and COLE, Circuit Judges; WILHOIT, District Judge*.

H. Michael Vonderheide, a pro se plaintiff, appeals a district court judgement dismissing his civil action filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. §552. This case has

*The Honorable Henry R. Wilhoit, Jr., United States District Judge for the Eastern District of Kentucky, sitting by designation.

been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Seeking equitable relief, Vonderheide sued the Internal Revenue Service (IRS) for failing to comply with his written request for copies of any Forms 5546 in his IRS file. The IRS moved to dismiss for lack of subject matter jurisdiction, arguing that Vonderheide's tax records did not contain any Forms 5546. Upon de novo review of a magistrate judge's recommendation and over Vonderheide's objections, the district court granted the IRS's motion to dismiss under Fed. R. Civ. P. 12(b)(1).

In his timely appeal, Vonderheide essentially reasserts his claim. The IRS now contends that its motion to dismiss incorrectly treated the adequacy of its records search as a jurisdictional matter and that the district court instead should have granted summary judgment to the IRS.

Where an appeal concerns a factual attack on subject matter jurisdiction, this court reviews the factual findings of the district court for clear error and the legal conclusions de novo. *See* Fed. R. Civ. P. 52(a); *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1135 (6th Cir. 1996); *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994).

We conclude that the district court properly dismissed the action for lack of subject matter jurisdiction for the reasons stated by the magistrate judge and adopted by the district court. "Under 5 U.S.C. §552(a)(4)(B) federal jurisdiction is dependent upon a showing that an agency has (1) 'improperly'; (2) 'withheld'; (3) 'agency records.' Judicial authority to devise remedies and enjoin agencies can only be invoked, under the jurisdictional grant conferred by §552, if the agency has contravened all three components of this obligation." *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 150 (1980). Agency possession of the requested documents is "an indispensable prerequisite to liability in a suit under the FOIA." *Id.* at 155. The IRS provided evidence in the form of affidavits that it had conducted a good faith search and that it did not possess the requested documents. *Se Oglesby v. United States Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); *Perry v. Block*, 684

F.2d 121, 127 (D.C. Cir. 1982).

Because the IRS did not file a notice of appeal, we deny the IRS's request to treat the district court's dismissal as a grant of summary judgment. A party who does not appeal the final judgment cannot enlarge its own rights or lessen the rights of its adversary, whether it desires to correct an error or supplement a judgment. *Francis v. Clark Equip. Co.*, 993 F.2d 545, 552-53 (6th Cir. 1993).

Accordingly, the district court's judgment is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit

Entered By Order Of The Court
"s/Leonard Green"
Clerk

Appendix B

United States Court of Appeals
For the Sixth Circuit
No. 98-4277

FILED

JAN 21 2000
LEONARD GREEN, Clerk

H. Michael Vonderheide,

Plaintiff-Appellant,

v.

Internal Revenue Service,

Defendant-Appellee.

ORDER

Before: RYAN and COLE, Circuit Judges; WILHOIT, District Judge*.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the

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*The Honorable Henry R. Wilhoit, Jr., United States District Judge for the Eastern District of Kentucky, sitting by designation.

original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Entered By Order Of The Court
"s/Leonard Green, Clerk"

Appendix C

In The United States District Court
For The Southern District Of Ohio
Western Division

H. Michael Vonderheide,	)	
	)	Case No. C-1-96-686
Plaintiff,	)	
	)	
v.	)	FILED
	)	KENNETH J. MURPHY
Internal Revenue Service,	)	CLERK
	)	
Defendant.	)	98 AUG 25 PM 3:15
	)	
		U.S. DISTRICT COURT
		SOUTHERN DIST. OHIO
		WETS D.V. CINCINNATI

ORDER ADOPTING REPORT AND RECOMMENDATION

On June 29, 1998, United States Magistrate Judge Timothy S. Hogan issued a Report and Recommendation pursuant to which he recommended that this Court grant Defendant's motion (Doc. 17) to dismiss this action for lack of subject matter jurisdiction and deny as moot Plaintiff's motion (Doc. 22) for declaratory judgment. Plaintiff timely filed a motion to review and objections to the Report and Recommendation.

The Magistrate Judge entered his Report and Recommendation pursuant to Rule 72(b) of the Federal Rules of

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*The Honorable Henry R. Wilhoit, Jr., United States District Judge for the Eastern District of Kentucky, sitting by designation.

Civil Procedure. Accordingly, the Court must review de novo the portions of the Report and Recommendation to which Plaintiff specifically objects.

Having conducted a de novo review, the Court is convinced that Plaintiff's objections are without merit. The Magistrate Judge correctly concluded that the Court was without jurisdiction to grant relief requested by Plaintiff in his complaint. Accordingly, Defendant's motion (Doc. 17) to dismiss for lack of subject matter jurisdiction is **GRANTED**. Plaintiff's motion (Doc. 22) for declaratory judgment is **DENIED** as moot. This action is **CLOSED**.

IT IS SO ORDERED
"s/Sandra S. Beckwith"
United States District Judge

Appendix D

United States District Court
Southern District Of Ohio
Western Division

H. Michael Vonderheide,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. C-1-96-686
	)	BECKWITH, J.
Internal Revenue Service,	)	HOGAN, M.J.
	)	FILED
Defendant.	)	KENNETH J. MURPHY
	)	CLERK

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U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
WETS D.V. CINCINNATI

REPORT AND RECOMMENDATION
and
ORDER

This matter is before the Court upon Defendant's motion to dismiss for lack of subject matter jurisdiction (Doc. 17), Plaintiff's motion to compel with sanctions (Doc. 21) and Plaintiff's motion for declaratory judgment (Doc. 22).

Plaintiff brings this action for judicial review of a request for a document from the Internal Revenue Service under the Freedom of Information Act, ("FOIA") 5 U.S.C. Sec. 522.

Defendant, the Internal Revenue Service, argues that the Court should dismiss Plaintiff's complaint for lack of subject matter

jurisdiction on the grounds that the Court does not have jurisdiction to order relief under the FOIA because the Defendant has conducted a reasonable search and has determined that the documents sought by the Plaintiff do not exist. Thus, the court does not have the jurisdiction to order relief under "FOIA".

DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION SHOULD BE GRANTED.

Under a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, Defendants can attack the complaint's jurisdictional allegations even though they are formally sufficient. *Baker v. Siemens Energy and Automation, Inc.*, 838 F. Supp. 1227, 1229 (S.D. Ohio 1993)(Spiegel, J.). When the Court reviews a factual attack on subject matter jurisdiction, no presumption of truthfulness applies to the factual allegations of the complaint. *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). The court may rely on affidavits or any other evidence properly before it and has wide latitude to collect evidence to determine the issue of subject matter jurisdiction. *Rogers v. Stratton Industries, inc.*, 798 F.2d 913, 915 (6th Cir. 1986). The Court is entitled to resolve factual disputes and is free to weigh the affidavits, documents and other evidentiary matters presented and satisfy itself as to its power to hear the case. *Ritchie*, 15 F.3d at 598. The Court must consider factual issues in a manner that is fair to the nonmoving party. *Rogers*, 798 F.2d at 915. Plaintiff must demonstrate jurisdiction in order to survive the motion. *Moir v. Greater Cleveland Regional Transit Authority*, 895 F.2d 266, 269 (6th Cir. 1990). "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed. R. Civ. P. 12(h)(3).

For Plaintiff to prevail on this matter, he must show that the IRS has (1) improperly, (2) withheld, (3) agency records. *Kissinger v. Reporter's Comm. For Freedom of the Press*, 445 U.S. 136, 150.

To prevail in this matter, Defendant must prove that each document Plaintiff requested was "within the class requested" and "has been produced, is identifiable, or is wholly exempt from the Act's inspection requirement". *Miller v. Department of State*, 779

F.2d 1378, 1383 (8th Cir. 1985). The agency as such, has a duty to conduct a "reasonable" search for responsive records. *Zemansky v. United States EPA*, 767 F.2d 569 (9th Cir. 1985); *Weisburg v. Department of Justice*, 705 F.2d 1344, 1352 (D.C. Cir. 1983). The agency is only required to show that it made a good faith effort to search for the requested documents, "using methods which can be reasonably expected to produce the information requested." *Oglesby v. United States Department of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). The agency may, as the IRS did here, provide affidavits of personnel that conducted the search: "Affidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice to demonstrate compliance with the obligation imposed by the FOIA." *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982).

In the case at bar, Plaintiff seeks to compel release of a document which Defendant claims does not exist. On April 27, 1996, Plaintiff requested copies of "the" 5546 Forms generated by the IRS between 1990 and 1995 which allegedly indicate Plaintiff's involvement in ATF activities. Defendant states that 5546 forms are "charge slips" that show where files have been "checked out" within the IRS system. He claimed that these forms detailed involvement he had with the Bureau of Alcohol, Tobacco and Firearms. Defendant presents affidavits of both the Disclosure Specialist in Washington, and the local Disclosure Specialist who handled Plaintiff's request. Both specialists searched their respective offices and determined that no such document was ever generated regarding Plaintiff. (Doc. 17). The IRS also compiled Plaintiff's tax returns for the relevant years, and found no 5546 forms attached to them. Defendant contends that under standard operating procedure, if the 5546 forms existed, they would have been attached to the returns. Under the Freedom of Information Act, the governmental branch receiving the request for a document is only required to give the requestor documents already in existence. The IRS here was not compelled to generate documents that are not already kept, simply upon plaintiff's request. Defendant claims to have made a reasonable search for the document and this search is all the FOIA requires of it. *Tijerina v. Walters*, 821 F.2d 789, 799 (D.C. Cir. 1987).

The Defendant correctly argues that since, after a reasonable

search, they have determined that the documents requested do not exist, the court has no subject matter jurisdiction, (or, in fact, no subject matter) giving it the authority to compel the IRS to fulfill Plaintiff's request Accordingly Defendant's Motion to Dismiss Should Be Granted.

PLAINTIFF'S MOTION TO COMPEL WITH SANCTIONS IS DENIED. AND PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION IN OPPOSITION OF DEFENDANT'S MOTION TO DISMISS IS STRICKEN.

Additionally, Plaintiff has filed a Motion to Compel with Sanctions on the Defendant. (Doc. 21). Pursuant to the local rule, Motions to Compel "shall be accompanied by a supporting memorandum and by an affidavit of counsel setting forth the extrajudicial means which have been attempted to resolve differences". S.D. Ohio, L.R. 37.2. Plaintiff included no such affidavits, and there is no indication on the record that Plaintiff made any effort to contact Defendant's counsel prior to making this motion. Furthermore, due to the Court's findings regarding Defendant's motion to dismiss, Plaintiff's motion to compel is moot. Accordingly, Plaintiff's Motion to Compel should be DENIED.

Plaintiff mistakenly filed a response to a reply which is in violation of the local rules of procedure. Pursuant to S.D. Ohio L.R. 7.2(a)(2), "No additional memoranda...are permitted". As such, Plaintiff's reply memorandum is hereby STRICKEN.

PLAINTIFF'S MOTION FOR DECLARATORY JUDGEMENT SHOULD BE DENIED AS MOOT.

Finally, Plaintiff has filed a Motion for Declaratory Judgement (Doc. 22). As the Court has recommended that Defendant's Motion To Dismiss Be Granted, Plaintiff's Motion (Doc. 22) should be denied as moot.[1]

IT IS THEREFORE RECOMMENDED THAT:

1.) Defendant's Motion to Dismiss for Lack of Subject Matter

Jurisdiction be GRANTED, and Plaintiff's claim be DISMISSED.

2.) Plaintiff's Motion for Declaratory Judgment (Doc. 22) Be DENIED as MOOT.

IT IS THEREFORE ORDERED THAT:

Plaintiff's motion to compel with sanctions is DENIED.

Plaintiff's reply to Defendant's response regarding Defendant's motion to dismiss is STRICKEN.

Date: June 26, 1998

vmcf/TSH

"s/Timothy S. Hogan"
United States Magistrate Judge

[1] Declaratory judgment is proper when there is no other available remedy. In the case at bar there is no action to seek remedy from.

Fed.R.Civ.P. 57(a).
The procedure for obtaining a declaratory judgment pursuant to Title 28 U.S.C. §2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.

Appendix E

§706. SCOPE OF REVIEW

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall–

1.) compel agency action unlawfully withheld or unreasonably delayed; and

2.) hold unlawful and set aside agency action, findings, and conclusions found to be–

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.